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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM 1986

PHOENIX NEWSPAPERS, INC. AND EDYTHE JENSEN

Petitioners,

v.

STEVE W. BOSWELL AND JIM MOFFORD

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

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QUESTION PRESENTED

I. WHETHER THE FIRST AMENDMENT AND *GERTZ* V. *ROBERT WELCH, INC.* PROHIBIT A PRESUMPTION OF NEGLIGENCE IN A PRIVATE PERSON DEFAMATION CASE.

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*Pursuant to Supreme Court Rules 21.1(b) and 28.1, the following were parties to the proceedings below:

Steve W. Boswell

Jim Mofford

Phoenix Newspapers, Inc.

Edythe Jensen

Central Newspapers, Inc. is the parent company of Phoenix Newspapers Inc. Phoenix Newspapers, Inc. has no subsidiaries.

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OPINIONS BELOW

The following are reproduced in their entirety in the appendix:

The opinion of the Court of Appeals of the State of Arizona, dated February 28, 1985. *Boswell* v. *Phoenix Newspapers, Inc.*, 730 P.2d 178 (Ariz. Ct. App. 1985).

The order of the Court of Appeals of the State of Arizona denying the motion for reconsideration, dated April 12, 1985.

The opinion of the Supreme Court of Arizona, dated December 4, 1986. *Boswell* v. *Phoenix Newspapers, Inc.*, 730 P.2d 186, 55 U.S.L.W. 2399 (Ariz. 1986).

JURISDICTIONAL STATEMENT

This libel case, involving private individuals, was tried in the Maricopa County Superior Court in Phoenix, Ari-

zona. After receiving a negligence instruction pursuant to *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 324 (1974), the jury returned a verdict for defendants. The trial court denied plaintiffs' motions for directed verdict and judgment n.o.v. and entered judgment for defendants on April 2, 1981.

Respondents appealed the judgment to the Court of Appeals of the State of Arizona. The judgment was reversed and remanded by said court in an opinion dated February 28, 1985. The Court of Appeals denied the motion for reconsideration in an order dated April 12, 1985.

On August 20, 1985, the Arizona Supreme Court granted petitioners' petition for review. In an opinion dated December 4, 1986, the Arizona Supreme Court reversed the trial court judgment, approving the opinion of the court of appeals as supplemented.

Jurisdiction over this matter is conferred upon this court by 28 U.S.C. § 1257(3) (1976).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

The Fourteenth Amendment to the United States Constitution provides, in part:

> No State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person

within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Respondents, Steve Boswell and Jim Mofford, were security guards whose names were erroneously substituted, in an article published April 2, 1977 in The Phoenix Gazette, for those of two men they had apprehended. The article, in part, indicated respondents had pled guilty to the charge of burglary. The reporter's source for the article, an assistant county attorney, brought the error to her attention and a correction was published in the next edition of the newspaper prior to any demand.

The article reported on the trial of a third suspect in the burglary. The reporter's source, Deputy County Attorney Stan Munger, had completed a week-long prosecution of the burglary case, before a jury, on April 1, 1977 (Reporter's transcript, hereafter "RT", IV 467, 474). He complained the trial lasted too long and he had obtained only a misdemeanor conviction (RT IV 467-8, 471,476). At the time of the libel trial, he could not recall procedural details of the burglary case (RT IV 496). Neither could Munger recall how soon after the trial he spoke to the reporter, saying, "I don't claim to have a perfect memory" (RT IV 474).

The reporter, Edythe Jensen, interviewed Munger in his office following the verdict. Munger testified the reporter took notes during the interview and he "observed her writing down information" as he gave it to her (RT IV 477, 487, 493). Munger neither took notes nor recorded the interview (RT IV 487, 493). Jensen then went to her desk and wrote the story from her notes (RT I 23, 33). The published article incorrectly identified respondents as the two accomplices who pleaded guilty to second degree burglary.

At the time of trial, Jensen had no specific recollection of the step-by-step details of the interview with Munger (RT I 16-17) and, since they no longer served a purpose, had thrown her notes away after writing the story (RT I 32-33). Jensen testified that her habit was first to obtain the full names of individuals and their descriptions, writing them at the top of her notes, then using initials or short names in the balance of her notes:

> Q. Can you tell us how those notes were structured, how they were written and made up?
>
> A. Well, it was my routine when I take notes to obtain correct spellings of names at the onset of an interview so that I won't interrupt a person's train of thought when they are telling me something. And I ask them for all these correct spellings and I place the names on the top of my page. And as the person relates the story of the incident, I may use initials or just the last name or first name if they're all different.
>
> Q. All right. And to the best of your recollection, did you follow that procedure in this particular instance?
>
> A. I — I have no independent recollection, but it was my practice.
>
> Q. Well, did you ever deviate from that practice?
>
> A. I don't think so.

(RT I 32-33). Munger confirmed the reporter asked for the names of parties and witnesses and that he provided those names to her (RT IV 476-77). Munger denied confusing the names: "I have made other mistakes but not that mistake" (RT IV 494).

Respondent Jim Mofford saw the article a few days after publication and immediately telephoned Munger. He

accused Munger of giving the reporter the wrong information (RT IV 584-85). Munger denied even talking to the reporter and stated to Mofford: "What reporter?," "I haven't talked to any reporters," and "We were under a gag order and I didn't tell any reporter anything" (RT IV 585). At the trial of the libel action Munger denied making these statements to Mofford (RT IV 489).

Jensen was and always had been an excellent reporter. Her superiors "had implicit faith and absolute confidence in her ability as a reporter" (RT II 95). Based on their experiences working with Jensen, her superiors had no reason to doubt the accuracy of stories she submitted (RT II 96, 117; VI 986-87). Munger testified that Jensen always had been accurate in reporting cases in which he had been involved (RT IV 484-85).

Respondents moved for directed verdict on the issue of liability at the close of all testimony (RT VI 1013). The trial court denied the motion without soliciting oral argument from petitioners (RT VI 1014). The court previously had received petitioners' memorandum of law, which argued *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), and *Time, Inc.* v. *Firestone*, 424 U.S. 448 (1976), required proven, not presumed, negligence. Trial Memorandum: Proof of Negligence (March 24, 1981) (Clerk's index of the record, hereafter "CR," 104).

After receiving a negligence instruction pursuant to *Gertz* v. *Robert Welch, Inc.*, the jury returned a verdict for defendants. Respondents moved for a new trial, arguing the court should have directed a verdict on the issue of negligence. Motion for New Trial (April 8, 1981) (CR 119). Petitioners argued that respondents failed to introduce evidence of negligence as required by cases interpreting *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974). Response to

New Trial Motion (April 14, 1981) (CR 122). Respondents' motion for a new trial was denied.

Petitioners' brief before the court of appeals argued that *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), and *Time, Inc.* v. *Firestone*, 424 U.S. 448 (1976), precluded any presumption of negligence and that respondents' proof was inadequate to sustain a motion for directed verdict. Without reference to constitutional issues, the court of appeals reversed the trial court, adopting respondents' contention "that under the doctrine of *res ipsa loquitur* negligence was proven as a matter of law." Appendix A at 6a. In its motion for rehearing, petitioners argued application of the doctrine was impermissible under the first amendment. Motion for Reconsideration 7. The Court of Appeals denied the motion without comment.

Petitioners made the same claim to the Arizona Supreme Court. Petition for Review 8-12 (April 26, 1985). Without comment, that court approved the Court of Appeals' resolution of this issue.

ARGUMENT

I. THE OPINION BELOW HOLDS THE PRESS PRESUMPTIVELY AT FAULT.

The appellate courts below held as a matter of law that Jensen erred *and* was negligent. They held, in effect, that Munger's testimony shifted the burden of proof to defendants, creating a conclusive presumption of fault that could be overcome only by Jensen's unequivocal testimony that "Munger made the mistake."

Being unable to recall details of the incident, Jensen could testify only: that she took notes during the interview; that she wrote the article from those notes; that her habit

was to obtain full names at the outset and otherwise identify parties in the body of her notes; and that she did not vary from her usual practice. The jury was faced with deciding, first, who made the error — Munger or Jensen — and, next, if Jensen made the mistake, whether she was negligent. Apparently the jury disbelieved Munger and decided either that Munger made the mistake or that plaintiffs failed to convince them Jensen made the mistake or did so as the result of any negligence on her part.

The presumption adopted below essentially vitiates the requirement of fault laid down in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974). It penalizes the reporter who does not have total recall for specific details of an interview four years earlier. It places the press at the mercy of sources — oftentimes later plaintiffs — who could insure a directed verdict simply by denying their own fault. It places on the press the burden of proving the absence of fault even in the face of privilege. It presumes fault from the error alone.

Such a presumption is an impermissible return to strict liability for defamation and violates the first amendment to the United States Constitution.

II. ARIZONA'S APPLICATION OF *RES IPSA LOQUITUR* IMPERMISSIBLY SHIFTS A DEFAMATION PLAINTIFF'S BURDEN OF PROVING FAULT.

The first amendment prohibits states from imposing liability in a defamation action without evidence of fault amounting at least to negligence. *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974); *Time, Inc.* v. *Firestone*, 424 U.S. 448 (1976). The unmistakable thrust of this court's prior decisions is that negligence cannot be presumed from evidence of the error alone. "The power to create presumptions is not a means of escape from constitutional restrictions."

New York Times Co. v. *Sullivan*, 376 U.S. 254, 284 (1964), *quoting Bailey* v. *Alabama*, 219 U.S. 219, 239 (1911). The burden of proof and persuasion is upon the plaintiff.

Plaintiffs below produced no direct evidence of negligence. Negligence is "conduct that creates an unreasonable risk of harm." Restatement (Second) of Torts § 580B comment g (1976). "The standard of conduct is that of a reasonable person under like circumstances." *Id.*

Evidence of negligence is distinct from evidence of error. It may include evidence: the reporter relied on an improper source; that she failed to take the time necessary to get her story; that she did not take notes as any reasonable reporter might do; or that she did not ask the proper questions.

In the ordinary negligence case, Arizona courts would allow from this evidence only a permissible inference that the reporter made a mistake and that she was negligent in doing so. They would go no further:

> In this jurisdiction *res ipsa loquitur* does not raise a presumption, but merely a permissible inference. The jury is *permitted* to infer negligence from the circumstances, but is not *required* to do so even in the absence of rebutting evidence.

Holland v. *Kitterman*, 14 Ariz. App. 179, 182, 481 P.2d 549, 552, *review denied* (1971) (emphasis in original). This application comports with the widely recognized majority rule:

> The inference of negligence to be drawn from the circumstances is left to the jury. They are permitted, but not compelled to find it. The plaintiff escapes a nonsuit, or a dismissal of his case, since there is sufficient evidence to go to the jury; but the

> burden of proof in most jurisdictions is not shifted to the defendant's shoulders, nor is any "burden" of introducing evidence usually cast upon the defendant, except in the very limited sense that if the defendant fails to do so, he runs the risk that the jury may very well find against him.

Prosser and Keaton on Torts 258 (5th ed. 1984).

The present appellate opinions have raised *res ipsa loquitur*, when applied in a libel situation, to the level of a conclusive presumption — a presumption that can be overcome only by media introduction of direct evidence that someone other than the media made the mistake. The court held that defendants' inferential evidence, tending to cast doubt on Munger's testimony and showing that Jensen was a highly regarded journalist with a habit of careful reporting and interviewing, was either immaterial or insufficient to overcome the presumption and that a directed verdict was required. Such a result is a de facto return to a rule of strict liability in defamation.

III. PROOF OF NEGLIGENCE — BEING CONSTITUTIONALLY REQUIRED — IS SUBJECT TO DE NOVO APPELLATE REVIEW.

In cases involving the actual malice standard, a de novo review of the evidence must be conducted by appellate courts. *Bose Corp.* v. *Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984). This court inferentially has subjected the facts under a constitutional requirement of negligence to the same de novo review. *See, e.g., Time, Inc.* v. *Firestone*, 424 U.S. 448, 465-67 (1976) (Powell, J., concurring). Lower courts have recognized the requirement of de novo review, *see e.g., Levine* v. *CNP Publications, Inc.*, 738 F.2d 660, 683 (1984) (dissenting opinion), *reh'g denied*, 753 F.2d 1341-2

(5th Cir. 1985), as does the Restatement. Restatement (Second) of Torts § 580B comment k (1976).

Under the instant facts, it is clear a jury issue existed as to whether the mistake was made by Munger or Jensen. Though Munger claimed he could not have made this mistake, he admitted his memory four years after the interview was not perfect and testified he could not remember details of the underlying criminal prosecution or precise circumstances of the interview. He did concede the reporter took notes during the interview. One of the plaintiffs also testified that Munger, like Peter, had thrice denied even speaking to a reporter. Obviously, Munger's credibility was at issue. At the same time, Jensen was described as a reporter who did not make mistakes. She testified regarding her standard practice interviewing people and writing stories. She asked all the right questions, took notes of her interview and wrote the article immediately after the interview from her notes. Nothing in the evidence suggests Jensen's practice on that day was careless other than the publication itself.

Plaintiffs avoided a directed verdict on the issue of negligence solely by the application of *res ipsa loquitur*. There existed issues as to Munger's credibility and, only because of the inference permitted, Jensen's care. The trial court was correct to deny a directed verdict for plaintiffs.

IV. THE COURT'S RULING BELOW CONSTITUTES AN IMPERMISSIBLE GOVERNMENT REGULATION OF THE FREEDOM OF EXPRESSION.

"Error and misstatement are inevitable in any scheme of truly free expression and debate." *Lorain Journal* v. *Milkovich*, ___ U.S. ___, 106 S. Ct. 322, 88 L. Ed. 2d 305 (1985) (Brennan, J., dissenting). "The First Amendment requires that we protect some falsehood in order to protect

speech that matters." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 341 (1974). "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *NAACP* v. *Button*, 371 U.S. 415, 433 (1963).

Through a number of decisions, this court has defined limits on the government's ability to restrict free expression. *See, e.g., Stromberg* v. *California*, 283 U.S. 359 (1931); *Bridges* v. *California*, 314 U.S. 252 (1941); *Roth* v. *United States*, 354 U.S. 476 (1957); *NAACP* v. *Button*, 371 U.S. 415 (1963). A court decision, too, is state action and, thus, state regulation. *See New York Times Co.* v. *Sullivan*, 376 U.S. 254, 265 (1964).

The Arizona Court of Appeals has established a minimum level of evidence a newspaper *must produce* in order to avoid liability for the "inevitable" misstatement in our scheme of free expression. Such court regulation usurps the jury's function in its role as representative of the citizenry to determine the limits to which the government may infringe on freedom of expression. *See* Parker, *Free Expression — The Jury Function*, 65 B.U.L. Rev. 483, 557 (1985).

Recent cases involving free speech emphasize the role of the court in guarding defendants in first amendment cases from majoritarian intolerance, as expressed through jury verdicts. *Bose Corp.* v. *Consumers Union of U.S.*, Inc., 446 U.S. 485 (1984). That judicial control is to be guarded jealously. However, it is easy to forget that the genesis of our jury system lay in a world where common citizens looked to their peers for protection from the tyranny of courts. P. Devlin, *Trial by Jury* n. 66 at 159-60 (1956); A. Denning, *Freedom Under Law* 63-64 (1949); Henderson, *The Background of the Seventh Amendment*, 80 Harv. L. Rev. 289, 328 (1966).

Freedom of expression in this country was born in the spirit of debate that preceded our revolution. The trial of colonial printer John Peter Zenger in 1735 for seditious libel established the power of the jury in this area, dooming the use of seditious libel as a restraint on free expression for the balance of our colonial period. Nelson, *Seditious Libel in Colonial America*, 3 Am. J. Legal Hist. 160 (1959).

The courts below overlooked the jury's historical function of protecting freedom of expression. Where the jury has acted to protect freedom of expression, courts should not interfere. Parker, *Free Expression — The Jury Function*, 65 B.U.L. Rev. 483, 495 (1985).

CONCLUSION

In a long and well-developed line of cases, this court has moved defamation law from the era of strict liability to one in which a plaintiff must prove fault amounting at least to negligence. That fault cannot be presumed from an error alone, but must be shown by substantial evidence. The courts below have circumvented this evolution. They have taken what amounts to no more than a permissible inference in common law negligence cases and transformed it to a conclusive presumption of fault in a libel suit. In doing so, the courts below denied to the jury its original role of protecting basic first amendment rights. Petitioners respectfully request that this court grant the Petition for Certiorari, and, ultimately, reinstate the trial court's judgment.

Respectfully submitted this day of March, 1987.

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APPENDIX A

IN THE

Court of Appeals

STATE OF ARIZONA
DIVISION ONE

STEVE W. BOSWELL AND JIM MOFFORD, *Plaintiffs-Appellants,* v. PHOENIX NEWSPAPERS, INC., an Arizona corporation; and EDYTHE JENSEN, *Defendants-Appellees.*	1 CA-CIV 6123 DEPARTMENT A

OPINION

Appeal from the Superior Court of Maricopa County
Cause No. C-366121
The Honorable John H. Seidel, Judge

REVERSED AND REMANDED

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GRANT, Judge

Appellants, Steve Boswell and Jim Mofford, brought a defamation action against Phoenix Newspapers, Inc., and reporter Edythe Jensen concerning an article published on April 2, 1977 in the Phoenix Gazette. The article, in part, erroneously claimed appellants had pled guilty to the charge of burglary in the second degree. A correction was published thereafter on April 4, 1977 indicating the mistake. After a trial to a jury the court entered judgment upon the verdicts in favor of the appellees Phoenix Newspapers and Jensen against both Boswell and Mofford.

On appeal the following issues are presented:

(1) whether the trial court erred in refusing to grant appellants' motion for a directed verdict on the issue of liability;

(2) whether the trial court erred in eliminating jury consideration of emotional distress as a proper element of damages;

(3) whether the Arizona correction statutes, A.R.S. §§ 12-653.01 *et seq.*, are unconsitutional;

(4) whether the trial court abused its discretion in precluding testimony of a previously undisclosed witness;

(5) whether the trial court erred in instructing the jury.

FACTS

On April 2, 1977 an article entitled "Store Stocker Convicted" appeared on page A-4 of the first section of the Phoenix Gazette. The story principally concerned the trial

and conviction of Gary M. Haring. The article in part stated:

> Prosecutor Stan Munger said Haring and two other men—all Lucky employees—backed a pickup truck behind the store at 3 a.m. Oct. 19, 1976, and loaded up cases of groceries, which included hams, dog food, two cases of coffee, beer, hotdogs and canned vegetables.
>
> Security guards tried to stop the trio, and they were finally arrested after a high speed chase through Tempe. All three men, Haring, Jim Mofford, and Steve Boswell, helped in the heist.
>
> Mofford and Boswell pleaded guilty to second degree burglary.

Edythe Jensen wrote the article based on a conversation she had with Maricopa County deputy attorney Stan Munger, who prosecuted the Haring case.

Contrary to the article Mofford and Boswell were employed as security agents for Lucky, and had facilitated the arrest of the real culprits: Haring, Pete Keil, and Pat Gorman. After publication of the story Boswell telephoned Munger and Munger then contacted Jensen about the error. The Phoenix Gazette published a correction under the title "Beg Your Pardon" stating:

> Jim Mofford and Steve Boswell, security guards for Lucky's grocery store, were mistakenly identified in a Phoenix Gazette story Saturday as store employees who participated in a burglary at the store. The employes, who pleaded guilty to the burglary, are Pete Keil and Pat Gorman.

DIRECTED VERDICT

Boswell and Mofford argue on appeal that the uncontradicted evidence established appellees' negligence and consequently the trial court should have directed a verdict on the liability issue. A motion for a directed verdict admits the truth of all competent evidence introduced by the opposing party, including all reasonable inferences to be drawn therefrom. *Rocky Mountain Fire & Casualty Co.* v. *Biddulph Oldsmobile*, 131 Ariz. 289, 640 P.2d 851 (1982). The trial court, as well as this court, reviews the evidence in a light most favorable to the party opposing the motion. *Schnyder* v. *Empire Metals, Inc.*, 136 Ariz. 428, 666 P.2d 528 (App. 1983). A directed verdict will only be granted where no reasonable person could reach a different conclusion based on the evidence. *See Kavanaugh* v. *Kavanaugh*, 131 Ariz. 344, 641 P.2d 258 (App. 1981).

To prevail on a directed verdict motion here the evidence had to establish: (1) a false defamatory statement, (2) publication to a third party, and (3) negligence on the part of the publisher.[1] Appellees concede, and the evidence so proves, that the first two elements were met. State courts have divided over the appropriate standard of fault to be adopted in actions involving private plaintiffs such as Boswell and Mofford as opposed to public figures. Some courts have required proof of actual malice in the constitutional sense of the term, but the majority of the courts, including Arizona, have adopted a negligence standard. *Peagler* v. *Phoenix Newspapers, Inc.*, 114 Ariz. 309, 560 P.2d 1216 (1977); *Seegmiller* v. *KSL, Inc.*, 626 P.2d 968 (Utah 1981). The parties disagree on whether the evidence demonstrates

---

[1]Fault is the third element of liability. *Restatement (Second) of Torts* § 558 (1977). Such fault may consist of knowledge of falsity, reckless disregard of truth or falsity, or negligence. *Peagler* v. *Phoenix Newspapers, Inc.* In the instant action the appellants proceeded solely on a negligence theory.

unequivocally that Stan Munger correctly identified Keil and Gorman as the culprits to Edythe Jensen. It is not disputed that the article appeared in the Gazette exactly as Jensen wrote it.

At trial Stan Munger testified that:

Q. Mr. Munger, did you tell Edythe Jensen that Steve Boswell and Jim Mofford pleaded guilty to second degree burglary?

A. No, I didn't tell Edythe that.

Q. Did you tell her that Mr. Mofford and Boswell helped in the heist?

A. No, I didn't.

Q. Did you tell her that they were — that Mofford and Boswell were arrested after a high-speed chase through Tempe?

A. No, I did not.

Q. Did you tell her that Mr. Mofford and Boswell backed up a pickup truck behind the Lucky's store at 3:00 a.m. on October 19th and loaded up groceries?

A. No, I absolutely did not tell her that.

Q. Stan, how certain are you that you accurately related to Edythe Jensen the names of those involved?

A. Well, there's absolutely no doubt in my mind that I accurately told her who was involved.

* * *

Q. Are you sure that it was not possible that you may have made a mistake in giving her the information, sir?

A. Yes, I am. I'm very certain of that.

Q. You're absolutely positive?

A. I'm absolutely positive of that fact.

In contrast Edythe Jensen testified that she had no recollection of the conversation with Munger. Thus, appellants contend that the jury could not disregard the uncontradicted testimony of Munger, *see Fish* v. *Industrial Commission*, 12 Ariz. App. 486, 472 P.2d 97 (1970), and that under the doctrine of res ipsa loquitur negligence was proven as a matter of law.

Appellees argue first that any error is waived. Relying on *Scott* v. *Scott*, 75 Ariz. 116, 252 P.2d 571 (1953), it is argued that by the failure of appellants to object to the instruction on negligence, any error as to the propriety of the denial of the motion for directed verdict is waived. *Scott*, however, involved a challenge to the proferred contributory negligence instruction assuming the issue properly went to the jury. Here appellants do not assert the lower court incorrectly instructed the jury on the issue of negligence. The objection was not to the form of the negligence instruction but to whether the issue of negligence should have been submitted to the jury at all. Accordingly, we find the issue properly before this court.

Appellees' second argument is that the trier of fact could have reasonably rejected Munger's testimony based on evidence presented at the trial. Appellees point to evidence of Jensen's habits to provide sufficient evidence to defeat the directed verdict motion. Jensen testified at trial that:

Q. Did you take notes when you talked with Mr. Munger?

A. Yes, I did.

Q. And do you have those notes?

A. No, I don't.

Q. What happened to those notes?

A. I threw them away.

Q. Why did you throw them away?

A. I always throw notes away after I finish writing the story.

Q. Do they serve a purpose to be retained after the story is written?

A. No, they don't.

Q. Can you tell us how those notes were structured, how they were written and made up?

A. Well, it was my routine when I take notes to obtain correct spellings of names at the onset of an interview so that I won't interrupt a person's train of thought when they are telling me something. And I ask them for all these correct spellings and I place the names on the top of my page. And as the person relates the story of the incident, I may use initials or just the last name or first name if they're all different.

Q. All right. And to the best of your recollection, did you follow that procedure in this particular instance?

A. I — I have no independent recollection, but it was my practice.

Q. Well, did you ever deviate from that practice?

A. I don't think so.

Q. We are all creatures of habit, huh?

A. Yes.

Q. And what did you do after you got the information from Mr. Munger?

A. I went to one of two offices that I have to write stories and I wrote it and then submitted it.

Munger confirmed that Jensen did in fact inquire who the parties and witnesses were at Haring's trial.

Rule 406, Arizona Rules of Evidence, provides:

> Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

While habit evidence is admissible, character evidence is generally not. Rule 404, Arizona Rules of Evidence. Habit describes one's regular response to a repeated specific situation, while character refers to a generalized description of one's disposition. C. McCormick, *Law of Evidence* § 162, at 340-41 (1954); 2 J. Wigmore, *Evidence* § 375, at 384, n.2 (Chadbourn rev. ed. 1979).

Jensen's testimony rises to the level of habit since she indicates she always first obtains the correct spellings of names at the start of an interview. That, however, is insufficient to show that Munger misidentified the roles of the various persons in the burglary.[2] The habit to which the evidence could show Jensen conformed was only that she first obtained the correct spelling of the names of each of the

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[2]Similarly, appellees' repeated references to trial testimony of Jensen's good reputation is character evidence which does not prove she reported accurately what Munger told her. *See* Rule 404(a), Arizona Rules of Evidence.

parties involved. Jensen's notes were not presented at trial, nor could Jensen remember in which order the names were given to her. Therefore, a reasonable person would not be justified in rejecting Munger's unimpeached testimony.

Third, appellees assert that appellants' failure to produce expert testimony on the issue of negligence is fatal to their claim. In the trial court appellees claimed that the appellants should have presented some sort of expert testimony to prove that the paper did not exercise the skill customary within the profession of news dissemination. The appellants responded that since the standard of care is obvious, expert testimony was unncessary. *See Landgraff* v. *Wagner*, 26 Ariz. App. 49, 546 P.2d 26 (1976). In *Peagler* v. *Phoenix Newspapers, Inc.*, our supreme court stated that:

> Negligence is, of course, conduct which creates an unreasonable risk of harm. It is the failure to use that amount of care which a reasonably prudent person would use under like circumstances. The question which the jury must determine from the preponderance of the evidence . . . (citation omitted) is whether the defendants acted reasonably in attempting to discover the truth or falsity or the defamatory character of the publication . . .

Id. at 315, 560 P.2d at 1222.

Comment g to § 580B of the *Restatement (Second) of Torts* states in relevant part:

> The defendant, if a professional disseminator of news, such as a newspaper, a magazine or a broadcasting station, or an employee, such as a reporter, is held to the skill and experience normally possessed by members of that profession.

* * *

> In the absence of expert testimony, however, the court should be cautious in permitting the doctrine of res ipsa loquitur to take the case to the jury and permit the jury, on the basis of its own lay inferences, to decide that the defendant must have been negligent because it published a false and defamatory communication.

As a general principle we would agree with this statement. However, given the facts and circumstances of this case the absence of expert testimony on how a news reporter accurately takes notes of a conversation is not fatal. *See Seegmiller* v. *KSL, Inc.* It has not been suggested how the jury here would have been assisted by "expert" testimony. In any event appellants point out there was limited expert testimony in the form of the managing editor of the Phoenix Gazette who testified that Jensen had made a mistake and wasn't careful.

Therefore, based on the uncontradicted evidence of Munger that Jensen received accurate information that Mofford and Boswell were not the persons pleading guilty to second degree burglary, reasonable minds could only conclude that Jensen, and hence Phoenix Newspapers, Inc., were negligent. We must accordingly reverse the judgment entered below since we cannot say whether the jury decided this case for the newspaper on a finding of no liability or a finding of no damages. However, the trial court erred in submitting the issue of liability to the jury. In any retrial the other issues, except the preclusion of witness issue, may again arise, so we must address them.

DAMAGES INSTRUCTIONS

At trial the judge instructed the jury that:

> The elements of damages you may then consider are as follows: (1) Damages suffered in respect to his property, business, trade, profession or occupation; (2) Damages for loss of reputation.
>
> If you find that plaintiffs have proven the elements of defamation as set forth above and if you further find that defendants have published a correction in substantially as conspicious a manner as the statements claimed to be false and defamatory, you can only consider damages suffered in respect to his property, business, trade, profession or occupation.

Appellants objected to the giving of this instruction because it precluded recovery for appellants' emotional distress.[3]

Defamation is a common law action based upon a tortious invasion of one's interest in his or her reputation. 3 J. Dooley, *Modern Tort Law* § 36.01, at 26 (1984)("It is reputation which is defamed, reputation which is injured, reputation which is protected by the laws of libel and slander," quoting *Gobin* v. *Globe Publishing Co.*, 232 Kan. 1, 649 P.2d 1239 (1982)); L. Eldredge, *The Law of Defamation* § 2, at 2 (1978); W. Prosser, *Law of Torts* § 111, at 737 (4th ed. 1971). The cause of action for defamation encompasses protection to interests in freedom from emotional distress.

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[3]Appellants also objected to the failure to give their requested instruction 6 which indicated that damages could include personal humiliation, mental anguish and suffering, and emotional distress.

L. Eldredge, *supra*; W. Prosser, *supra*, § 112, at 761. *See generally Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974), *cert. denied* 459 U.S. 1226, 103 S. Ct. 1233, 75 L. Ed. 2d 467 (1983); *Horn* v. *Ruess*, 72 Ariz. 132, 231 P.2d 756 (1951). Recovery for emotional distress, however, constitutes parasitic damages. W. Prosser, *supra*, § 112, at 761. At common law generally one could recover for one's emotional distress caused by another's defamatory act only if the defamation were actionable per se[4] or if one proved pecuniary losses resulting from the defamation. J. Dooley, *supra*, § 36.04, at 34-39; J. Day, *Mental Suffering as an Element of Damages in Defamation Cases*, 15 Clev.-Mar. L. Rev. 26, 30-32 (1966).

The common law scheme was changed in 1967. A.R.S. § 12-653.02 provides that:

> In an action for damages for the publication of a libel in a newspaper or magazine, or of a slander by radio or television broadcast, the plaintiff shall recover no more than special damages unless a

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[4]Defamation is composed of libel and slander. Oversimplifying, libel is a written or visual defamation, while slander is an oral defamation. W. Prosser, *supra*, § 111, at 737. Libel per se in Arizona are those communications which on their face falsely tend to impeach one's honesty, integrity, or reputation. *Ilitzky* v. *Goodman*, 57 Ariz. 216, 112 P.2d 860 (1941). Where a communication is libelous only by considering extrinsic information, then it is considered libel per quod and actionable only upon proof of pecuniary loss. J. Dooley, *supra*, § 36.04, at 34-39.

Slander per se in Arizona are statements which charge one with a contagious or venereal disease; charge that a woman is not chaste; accusations which tend to injure a person in his or her profession, trade or business; or statements that impute the commission of a crime involving moral turpitude. *Modla* v. *Parker*, 17 Ariz. App. 54, 495 P.2d 494, *cert. denied sub nom.*, *Modla* v. *Southside Hospital*, 409 U.S. 1038, 93 S. Ct. 516, 34 L. Ed. 2d 487 (1972). Slander per quod are all slanderous utterances which are not slanderous per se. While slander per se is actionable without proof of pecuniary damages, W. Prosser, *supra*, § 112, at 754, slander per quod is not actionable unless pecuniary damages are pled and proved. *Modla* v. *Parker*.

> correction is demanded and not published or broadcast, unless the plaintiff shall prove the publication or broadcast was made with actual malice. The plantiff shall serve upon the publisher at the place of publication, or broadcaster at the place of broadcast, a written notice specifying the statements claimed to be libelous and demanding that the same be corrected. The notice and demand shall be served within twenty days after actual knowledge of the plantiff of the publication or broadcast of the statements claimed to be libelous.

Section 653.03 of that title reads:

> If a correction is demanded within the period prescribed by § 12-653.02, and is not published or broadcast in substantially as conspicuous a manner in the newspaper or magazine, or on the radio or television broadcasting station, as the statements claimed to be libelous, in a regular issue thereof published or broadcast within three weeks after service, plaintiff, if he pleads and proves the notice, demand and failure to correct, and if his cause of action is maintained, may recover general, special and exemplary damages subject to applicable rules of law governing such damages in this jurisdiction, but no exemplary damages may be recovered unless the plaintiff proves that defendant made the publication or broadcast with actual malice and then only in the discretion of the court or jury.

A.R.S. § 12-653.01, which is the definitional section, states:

> In this article, unless the context otherwise requires:
>
> 1. "Actual malice" means that state of mind arising from personal spite, hatred, or ill will toward the plaintiff, but such a state of mind occasioned by a good faith belief on the part of the defendant in the truth of the libelous publication or broadcast at the time it is published or broadcast shall not constitute actual malice.
>
> 2. "Exemplary damages" means damages which may, in the discretion of the court or jury, be recovered in addition to general and special damages for the sake of example and by way of punishing a defendant who has made the publication or broadcast with actual malice.
>
> 3. "General damages" means damages for loss of reputation.
>
> 4. "Magazine" or "newspaper" means any publication which may be mailed at the second class rates established by the United States post office.
>
> 5. "Special damages" means all damages which the plaintiff alleges and proves he has suffered in respect only to his property, business, trade, profession or occupation.

Appellants' argument is severalfold that under the correction statutes a plaintiff may still recover for emotional distress.[5] It is argued that under A.R.S. § 12-653.03, when a

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[5]Appellants conceded at the trial court that they could not prove "actual malice" as defined in A.R.S. § 12-653.01(1). In *Khalifa* v. *Muslim Students' Assoc.*, 131 Ariz. 328, 641 P.2d 242 (App. 1981), the Court of Appeals, Division Two implied that upon proof of "actual malice", as

(footnote continues)

correction is demanded but not published, a plaintiff can recover "general, special and exemplary damages *subject to applicable rules of law governing such damages in this jurisdiction* . . . . (emphasis added)." Appellants would have this court interpret the underscored "subject to" language to broaden the statutorily defined term of "general damages" to include the traditional element of emotional distress.

The purpose of statutory construction is to ascertain legislative intent. *National Union Fire Ins.* v. *Rick*, 134 Ariz. 122, 654 P.2d 56 (App. 1982). This court must follow clear and unambiguous language in a statute, and may not expand or stretch a statute not falling within its expressed provisions. *State* v. *Anway*, 87 Ariz. 206, 349 P.2d 774 (1960).

A careful reading of A.R.S. § 12-653.03 clearly demonstrates that the legislature did not intend to permit emotional distress to be an element of damage in a defamation action against a newspaper, magazine, or radio or television broadcaster. The "applicable rules of law" that the statutory damages are subject to are those "governing *such* damages in this jurisdiction." By using the term "such" the legislature meant to refer back to the statutorily enunciated damages.

CONSTITUTIONALITY

Appellants have contended that the Arizona correction statutes, A.R.S. §§ 12-653.01 *et seq.*, violate the due process

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(footnote continued)

defined in A.R.S. § 12-653.01(1), where no correction is demanded a plaintiff could receive more than "exemplary damages." We express no opinion on this interpretation of the correction statutes.

clauses of the United States[6] and Arizona Constitutions[7] by eliminating recovery in all instances for emotional distress and recovery in certain situations for loss of reputation. Also, it is asserted that these statutes violate the abrogation clause of the Arizona Constitution. Ariz. Const. art. 18, § 6.[8] Since we find the state abrogation clause issue is dispositive we do not reach the due process question. Therefore we are deciding this issue solely on state constitutional grounds.

ABROGATION CLAUSE

Article 18, § 6 of the Arizona Constitution guarantees:

> The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation.

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[6]The fourteenth amendment, in part, provides:

> [N] or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

[7]Article 2, § 4 states:

> No person shall be deprived of life, liberty, or property without due process of law.

[8]Appellees assert that appellants failed to properly preserve these constitutional issues for appellate review. While the record does not reveal any determination of the constitutionality of the correction statutes prior to the entry of judgment, nevertheless the constitutional issues can be decided by this court. Appellants raised the constitutional issue in the pre-trial statement, a memorandum directed solely to this issue, and in the motion for new trial. We presume from the adverse judgment that the trial court resolved the issues in favor of appellees. *Montgomery* v. *Bremer County Board of Supervisors*, 299 N.W.2d 687 (Iowa 1980). In any event, the validity of the correction statutes is of such importance that we will consider the arguments advanced on appeal. *See Barrio* v. *San Manuel Division Hospital*, No. 17165-PR (Ariz. Sup. Ct. Dec. 10, 1984); *Ruth* v. *Industrial Commission*, 107 Ariz. 572, 490 P.2d 828 (1971).

It is argued that the correction statutes effectively abrogate the common law action for defamation against the specified media defendants.

Appellees argue that the Arizona correction statutes do not abrogate the common law action of defamation. They rely on prior decisions defining the term "abrogated" to mean annul or repeal. *E.g.*, *Martinez* v. *Bucyrus-Erie Co.*, 113 Ariz. 119, 547 P.2d 473, *appeal dismissed*, 429 U.S. 880, 97 S. Ct. 228, 50 L. Ed. 2d 162 (1976). The statutes, appellees point out, do not apply to all defamation suits and in suits where they do apply plaintiffs are only limited in the type of damages which they may recover. Therefore we are asked to uphold the statutes' validity.

Since the briefing and argument of this case the Arizona Supreme Court has issued two opinions construing article 18, § 6. In *Kenyon* v. *Hammer*, No. 17141-PR (Ariz. Sup. Ct. Sept. 19, 1984) the court held that the right to bring a common law action for negligence was guaranteed under art. 18, § 6 of the Arizona Constitution. In *Barrio* v. *San Manuel*, No 17165-PR (Ariz. Sup. Ct. Dec. 10, 1984) the court held that a statute of limitations which effectively abrogates a damage action is invalid under the constitution. The court adopted the test of "reasonable election" as the distinction between regulation and abrogation and held: "The legislature may regulate the cause of action for negligence so long as it leaves a claimant reasonable alternatives or choices which will enable him or her to bring the action. It may not, under the guise of 'regulation,' so affect the fundamantal right to sue for damages as to effectively deprive the claimant of the ability to bring the action." We must now apply this test to the statutes in question. In doing so it is clear that the correction statutes so severely limit recovery that they effectively abrogate the right to recover damages. Our supreme court has now held that a right to recover

damages is a fundamental state constitutional right. The statutory scheme with which this case deals eliminates damages for emotional distress and severely limits other recoverable damages to damages suffered in respect only to property, business, trade, profession or occupation. This severe restriction may eliminate damages altogether in cases such as the one before us. We can foresee other types of plaintiffs who would be unable to recover damages even though unquestionably harmed such as the elderly, housewives or children who do not have a trade, business or profession to which damages could attach or be proven. (See discussion under damages Instruction, *ante*.) We hold therefore that A.R.S. §§ 12-653.01 *et seq.* are unconstitutional and must be stricken.[9]

INSTRUCTION

As part of the jury instructions the trial court instructed the jury as follows:

> In determining what the defendant's publication said or implied about the plaintiffs, you are to consider the article as a whole and the language used in the article is to be given its ordinary meaning as would be understood by the average reader.

Appellants objected to the giving of this instruction on the ground that the instruction did not deal with the issues in this case since there was no dispute that the article defamed Boswell and Mofford. Given the holding of this opinion this issue should not arise on retrial.

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[9]The appellant did not raise the question of whether the correction statutes are unconstitutional in another context. Therefore we need not decide whether the statutes violate the equal protection clause of article 2, § 13 of the Arizona Constitution. Similarly the question of whether the statutes violate article 2, § 9 prohibiting irrevocable grants of privileges, franchises or immunities was not raised or decided.

The judgment of the trial court is reversed and the cause remanded for further proceedings consistent with this opinion.

/s/
SARAH D. GRANT, Judge

CONCURRING:

/s/
JOE W. CONTRERAS,
Judge

BROOKS, Judge Specially Concurring,

While I strongly disagree with our Supreme Court's continuing expansion of the meaning, purpose and application of art. 18 § 6 of the Arizona Constitution, I do not doubt that the statutes at issue in this case are unconstitutional under the prevailing standards.

I concur in the result reached by the majority.

/s/
J. THOMAS BROOKS,
Presiding Judge

APPENDIX B

IN THE

Court of Appeals

STATE OF ARIZONA
DIVISION ONE

STEVE W. BOSWELL AND JIM MOFFORD, *Plaintiffs-Appellants,* v. PHOENIX NEWSPAPERS, INC., an Arizona corporation; and EDYTHE JENSEN, *Defendants-Appellees.*	1 CA-CIV 6123 DEPARTMENT A Maricopa County Superior Court No. C-366121

ORDER

The motion for reconsideration and response thereto were considered by the Court, Judges Sarah D. Grant, J. Thomas Brooks and Joe W. Contreras participating.

IT IS ORDERED denying the motion for reconsideration.

DATED this 12th day of April, 1985.

/s/ Sarah D. Grant
SARAH D. GRANT, JUDGE

A true copy of the foregoing order was mailed this 12th day of April 1985, to:

April 12, 1985

1 CA-CIV 6123

Department A

Maricopa County
Superior Court
No. C-366121

ORDER

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by

/s/ DONNA WILLINGHAM

DEPUTY CLERK

APPENDIX C

FILED DEC. 4, 1986
David R. Cole
Clerk Supreme Court

IN THE

Supreme Court of the State of Arizona

EN BANC

STEVE W. BOSWELL AND JIM MOFFORD, *Plaintiffs-Appellants,* *v.* PHOENIX NEWSPAPERS, INC., an Arizona corporation; and EDYTHE JENSEN, *Defendants-Appellees.*	No. 18159-PR Court of Appeals No. 1 CA-CIV 6123 Maricopa County Superior Court No. C-366121

APPEAL FROM THE SUPERIOR COURT OF
MARICOPA COUNTY
THE HONORABLE JOHN H. SEIDEL, Judge

REVERSED AND REMANDED

Opinion of the Court of Appeals, Division One
Ariz. , P.2d (1985)
approved as supplemented

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FELDMAN, Justice

Steve W. Boswell and Jim Mofford (plaintiffs) brought a defamation action against defendants Phoenix Newspapers, Inc. and Edythe Jensen, its reporter, alleging that defendants had published a story falsely charging plaintiffs with criminal activity. Over objection, the trial judge instructed the jury that if the newspaper had adequately retracted the false statement, plaintiffs could not recover general damages. The jury returned a verdict for defendants. The court of appeals held the statute requiring the retraction instruction unconstitutional under article 18, section 6 of the Arizona Constitution (art. 18, § 6). *Boswell* v. *Phoenix Newspapers, Inc.*, No. 1 CA-CIV 6123 (Ariz.Ct.App. Feb. 28, 1985). The court concluded, therefore, that the trial court had erred in giving the instruction, and remanded the case for a new trial.

We accepted review to determine the scope of the protection extended by art. 18, § 6. We have jurisdiction under Ariz. Const. art. 6, § 5(3), A.R.S. §§ 12-2101(B), (F)(1) (Supp. 1986), and Rule 23(c)(4), Ariz.R.Civ.App.P., 17A A.R.S. (Supp. 1986).

FACTS

In a story written by Jensen, *The Phoenix Gazette* incorrectly reported that plaintiffs had entered guilty pleas to second-degree burglary in connection with a theft from a grocery store. In truth, plaintiffs were security guards employed at the store and had helped apprehend the thieves. Upon learning of its error, *The Gazette* voluntarily published a correction in its next edition.

Their feelings unassuaged by this act of contrition, plaintiffs responded by filing this defamation action. They introduced evidence at trial to show that the defamatory publication had damaged their reputations, affected their

job performances, and inflicted severe emotional distress. Relying on A.R.S. §§ 12-653.02 and 12-653.03, the trial judge instructed the jury that if it found that the newspaper had published the retraction in substantially as conspicuous a manner as the defamatory article, it could award plaintiffs only those damages "suffered in respect to their property, business, trade, profession or occupation." This instruction, of course, would preclude the jury from awarding general damages for loss of reputation and emotional distress. From the evidence introduced at trial, the jury could have found that the retraction was adequate and that there were no special damages. Thus, the instructions embodying the cited statutes would have required a finding for defendants, even if the jury found that plaintiffs had sustained general damages. The verdict was for the defendants. After judgment was entered, plaintiffs appealed.

The court of appeals held that the trial court should have directed a verdict on the liability issue because defendants had been negligent as a matter of law. Slip op. at 10-11. It further held that A.R.S. §§ 12-653.02 and 12-653.03 are capable of only one construction: where a media defendant has published an adequate retraction, plaintiffs are limited to recovery of "special damages" — those "suffered in respect to . . . property, business, trade, profession or occupation."

The court of appeals then considered the validity of the statutes under art. 18, § 6 of the Arizona Constitution, which provides:

> The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation.

The court found that the retraction statutes "so severely limit recovery that they effectively abrogate the right to recover damages." Slip op. at 18-19. The court based this conclusion partially on the ground that the statutory scheme completely deprived large classes of defamation victims of a cause of action. *Id.* Approving the court's resolution of the other questions, we granted review solely on the abrogation holding.

COMMON LAW DEFAMATION

The constitutional protections available to these defendants are limited because plaintiffs are neither public officials nor public figures. *Dombey* v. *Phoenix Newspapers, Inc.*, ____ Ariz. ____, 724 P.2d 562, 566-67 (1986); *Peagler* v. *Phoenix Newspapers, Inc.*, 114 Ariz. 309, 312-15, 560 P.2d 1216, 1219-22 (1977); *see infra* at 25-26. The common law imposed strict liability on the publisher of defamatory statements. *Dombey*, Ariz. at , 724 P.2d at 566. Under the common law, a publication that brought a person into disrepute or impeached honesty, integrity, virtue, or reputation was libelous per se, and presumed false, entitling plaintiff to recover damages without proving actual loss. *Id.*; *Broking v. Phoenix Newspapers, Inc.*, 76 Ariz. 334, 337, 264 P.2d 413, 415 (1953); *Central Arizona Light & Power Co.* v. *Akers*, 45 Ariz. 526, 536, 46 P.2d 126, 131 (1935). Thus, under common law, if a publication was libelous per se, plaintiff did not have to allege or prove either actual or special damages, *Akers*, 45 Ariz. at 541, 46 P.2d at 133; general damage was presumed and could be awarded absent proof of any specific injury.[1] *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350, 94 S.Ct. 2997, 3011-12 (1974); *Conard* v. *Dillingham*, 23 Ariz. 596, 601-06, 206 P. 166, 168-70

[1]This rule, of course, is now limited by constitutional interpretation. *Post* at 25-26.

(1922); 50 Am.Jur.2d *Libel and Slander* § 356, at 878-80 (1970).

THE STATUTORY SCHEME

The common law was substantially changed by the challenged statutes, effective June 12, 1967. In effect, the statutes provide that a media defendant that retracts in accordance with the statutory scheme is potentially liable only for "special damages," unless a plaintiff can prove that the publication was made "with actual malice." A.R.S. § 12-653.02.[2] "Special damages" are damages that the plaintiff "proves he has suffered in respect only to his property, business, trade, profession or occupation." A.R.S. § 12-653.01(5). "General damages" are "damages for loss of reputation." A.R.S. § 12-653.01(3). A plaintiff can recover general *and* special damages from a media defendant only if the defendant failed to publish an adequate retraction after a demand. A.R.S. § 12-653.03.[3] As the

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[2]A.R.S. § 12-653.02 reads as follows:

> In an action for damages for the publication of a libel in a newspaper or magazine, or of a slander by radio or television broadcast, the plaintiff shall recover no more than special damages unless a correction is demanded and not published or broadcast, unless the plaintiff shall prove the publication or broadcast was made with actual malice. The plaintiff shall serve upon the publisher . . . a written notice specifying the statements claimed to be libelous and demanding that the same be corrected . . . .

[3]A.R.S. § 12-653.03 reads as follows:

> If a correction is demanded . . . and is not published or broadcast in substantially as conspicuous a manner . . . as the statements claimed to be libelous, . . . plaintiff, if he pleads and proves the notice, demand and failure to correct, and if his cause of action is maintained, may recover general, special and exemplary damages subject to applicable rules of law governing such damages in this jurisdiction, but no exemplary damages may be recovered unless the plaintiff proves that defendant made the publication or broadcast with actual malice and then only in the discretion of the court or jury.

court of appeals noted, the statutes apparently do not allow recovery for emotional distress under any circumstances. Slip op. at 16.

The trial court instructed the jury in accordance with these statutes. Thus, by peremptory instruction, plaintiffs were prohibited from recovering damages for emotional distress and, assuming the jury found the retraction adequate, were prohibited from recovering for loss of reputation. Because plaintiffs' proof might not have sustained recovery of "special damages," they argue that the statutes deprived them of all recovery in violation of art. 18, § 6.

Defendants contend that the constitutional provision does not apply. They claim that art. 18, § 6 protects only causes of action that were recognized by the common law when the constitution was adopted and that enabled plaintiffs to recover damages for *negligent* infliction of *bodily* injury. If defendants are correct, art. 18, § 6 would not apply in this case for either of two reasons. First, at the time of the Arizona Constitutional Convention of 1910, defamation was a strict liability action; negligence was not an issue. *Ante* at 5-6. Second, defamation injures reputation but does not inflict bodily injury. Defendants also contend that art. 18, § 6 does not apply because until 1922 no Arizona case had referred to emotional distress as an element of damage in a defamation action, and the constitution could not protect an element of damage not recognized when it was adopted. Moreover, even if art. 18, § 6 applies to defamation actions, defendants contend that the retraction statutes regulate rather than abrogate the action.

We turn to these issues.

DISCUSSION

I. The Scope of Constitutional Protection

A. The History of Art. 18, § 6

We interpret constitutional provisions by examining the text and, where necessary, history in an attempt to determine the framers' intent. *County of Apache v. Southwest Lumber Mills, Inc.*, 92 Ariz. 323, 327, 376 P.2d 854, 856 (1962). We have previously traced the history of art. 18, § 6 in the Constitutional Convention of 1910 and concluded that the clause is a "more specific and stronger" open court provision. *Kenyon v. Hammer*, 142 Ariz. 69, 74, 79-81 n.9, 688 P.2d 961, 966, 971-73 n.9 (1984); *see also Barrio v. San Manuel Division Hospital, Magma Copper*, 143 Ariz. 101, 105, 692 P.2d 280, 284 (1984).[4]

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[4]Additional historical evidence supports our conclusion that art. 18, § 6 is an open court guarantee. The proposed constitution recommended by the Constitutional Convention of 1891 had included an open court provision. Article 2, § 15 of this proposed constitution read as follows:

> All courts shall be open, and every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law.

Although the constitution of 1891 did not go into effect, the principles of art. 2, § 15 obviously were not forgotten. Variations of open court guarantees again were introduced during the 1910 constitutional convention. These read:

> The courts of justice of the state shall be open to every person, and speedy and certain remedy afforded for every injury to person, property or reputation; . . . .

Proposition No. 104.

> COURTS OF JUSTICE MUST BE OPEN: That courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, . . .

Proposition No. 116.

In *Kenyon* and *Barrio* we traced the evolution of art. 18, § 6 and art. 2, § 31 of the Arizona Constitution.

Thirty-seven states have "open court" or "certain remedy" provisions. Note, *Constitutional Guarantees of a Certain Remedy*, 49 IOWA L.REV. 1202 (1964).[5] The provision is of ancient origins, having its roots in the Magna Carta and having been given more modern currency in Sir Edward Coke's comments on the Magna Carta in his "Second Institute." *Id.* at 1203.[6]

As we stated in *Kenyon* and *Barrio*, art. 18, § 6 is an "open court" guarantee intended to constitutionalize the right to obtain access to the courts and a remedy for damages sustained. *Kenyon*, 142 Ariz. at 73-75, 79-83, 688 P.2d at 965-67, 971-75; *Barrio*, 143 Ariz. at 105, 692 P.2d at 284. We still must decide, however, exactly what types of actions and damages the framers intended to constitutionalize. Did the framers intend to limit the protection of art. 18, § 6 to negligence cases in which bodily injury was sustained or to extend it to all actions recognized at common law?

B. The Language of Art. 18, § 6

The language of art. 18, § 6 gives no hint that the framers intended to restrict its protection in the manner

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[5]In substance, these provisions provide that the courts "shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation." Note, *supra*, 49 IOWA L.REV. at 1202. Judicial construction of these provisions has varied. Some courts maintain that the open court guarantee preserves the existence of those causes of action which were well established at the time the constitutions were adopted. *Id.* at 1206. The more prevalent position is that legislatures have the right to alter common law rules and remedies, but they may not deny remedies altogether. Some adequate remedy must remain. *Id.* at 1206-07.

[6]"Coke asserted that 'every Subject . . . for injury done to him *in bonis, terris, vel persona*, by any other Subject . . . may take his remedy by the course of the Law, and have justice, and right for the injury done to him, freely without sale, fully without any denial, and speedily without delay.' " Note, *supra*, 49 IOWA L.REV. at 1203, *quoting* COKE, SECOND INSTITUTE 55-56 (4th ed. 1671).

defendants suggest. Its language is plain, clear, and "all-inclusive." *Kilpatrick v. Superior Court*, 105 Ariz. 413, 419, 466 P.2d 18, 24 (1970). Section 6 does not speak of negligence actions, but of the "right of action to recover damages."[7] It mentions no particular type of damage, but speaks instead to the broad "right . . . to recover damages for injuries." Article 18, § 6 contains no restrictive adjectives or phrases.

The constitutional text being unrestricted, it would be inappropriate for this court to restrict the guarantee by adding words of limitation "contrary to the plain language used." *Kilpatrick*, 105 Ariz. at 419-20, 466 P.2d at 24-25. We should not narrowly interpret the provision "in direct derogation of the express rights guaranteed in Section 6," *id.*, unless compelled to do so by prior construction that illuminates the framers' intent.

C. Prior Case Law

Defendants contend that precedent binds us to apply art. 18, § 6 to protect only *negligence* actions. The defendants and amici cite decisions in which this court stated that the constitution's framers intended that art. 18, § 6 protect "the common-law action of *negligence*" by giving it constitutional standing. *Alabam's Freight Co. v. Hunt*, 29 Ariz. 419, 443, 242 P. 658, 665 (1926) (emphasis added); *see also Kenyon*, 142 Ariz. at 79-83, 688 P.2d at 971-75; *Moseley v. Lily Ice Cream Co.*, 38 Ariz. 417, 420, 300 P. 958, 959 (1931); *Inspiration Consolidated Copper Co. v. Mendez*, 19

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[7]Other provisions in article 18 are more narrowly drawn. Article 18, § 7, which requires enactment of employers' liability law, mentions "accident" cases and "injury . . . caused by the negligence of the employee." Article 18, § 8, which deals with enactment of a workmen's compensation law, speaks of "personal injury" and "failure . . . to exercise due care."

Ariz. 151, 172, 166 P. 278, 1184 (1917) (Ross, J., dissenting), *aff'd sub nom.*, 250 U.S. 400, 39 S.Ct. 553 (1919); *Landgraff v. Wagner*, 26 Ariz.App. 49, 54, 546 P.2d 26, 31 (App. 1976), *appeal dismissed* 429 U.S. 806, 97 S.Ct. 40 (1976) (*for want of jurisdiction*). They contend that these decisions limit art. 18, § 6's protection to common law negligence actions *only*.

It is equally true, however, that this court has more expansively interpreted art. 18, § 6. For instance, Chief Justice Struckmeyer wrote:

> There is no room for quibbling. The language of Section 6 is simple, explicit and all-inclusive. It cannot be misunderstood. Without limitation it confers the right to recover damages for injuries as existing under the common law.

Kilpatrick, 105 Ariz. at 419, 466 P.2d at 24; *see also Halenar* v. *Superior Court*, 109 Ariz. 27, 504 P.2d 928 (1972) (legislature bound by the constitution in dealing with *common law rights* of action).

We do not find the language of any of the cases determinative. None of the cases cited actually dealt with the issue presented here. So far as we can determine from citations provided by counsel and from our own research, no Arizona appellate court has ever been asked to determine whether art. 18, § 6's protection is limited to the right to recover for negligent torts or for those torts in which bodily injury has been sustained. Thus, the issues before us are questions of first impression.

Defendants argue that we must adopt the narrow interpretation of art. 18, § 6 espoused in Justice Ross's dissent in *Inspiration Consolidated Copper*, 19 Ariz. at 169 *et seq.*, 166 P. at 1183 *et seq.*, which eventually became the law in *Alabam's Freight. Kenyon*, 142 Ariz. at 82, 688 P.2d at 974.

The "narrow" interpretation favored by Justice Ross, however, was directed to the question of whether art. 18, § 6 applied to causes of action created by the legislature but previously unrecognized by the common law. The issue in *Inspiration Consolidated Copper*, for instance, was whether art. 18, § 6 applied to the provisions of the new Employers' Liability Law. Justice Ross stated:

> That the above constitutional provisions [art. 18, §§ 4, 5, 6 and art. 2, § 31] do not apply to or affect the newly created rights of action for compensation against the employer is evident, or else our Workmen's Compensation Act would be violative of the Constitution, in that it [the statute] does limit the amount of recovery. For like reasons I think they do not apply to the liability created by the statute known as the Employers' Liability Act. This latter act creating new liability, — one not known to the common law and in derogation thereof, — it would seem that the power of the legislature to fix the measure of compensation in disregard of the common-law rule is as absolute as under the compensation act.

Inspiration Consolidated Copper, 19 Ariz. at 172, 166 P. at 1185 (Ross, J., dissenting). The *Inspiration Consolidated Copper* court, however, held that art. 18, § 6 protected common-law measures of recovery even in actions previously unknown to the common law. 19 Ariz. at 166-67, 166 P. at 284-85.

A majority eventually approved Justice Ross's narrower view in *Alabam's Freight*. Using language similar to that used by Justice Ross in *Inspiration Consolidated Copper*, the court described art. 18, § 6 as a guarantee of the "common-law action of negligence." 29 Ariz. at 443-44, 242 P. at 665. Again, however, the issue was whether art. 18, § 6

applied not only to common law actions, but also to those actions created by the legislature. *Alabam's Freight's* negative reponse to that question is not determinative in this case because the cause of action for defamation was not a legislative creation.

Thus, nothing in past decisions demonstrates that the framers intended to limit the broad language of the constitutional guarantee to protect actions for negligent torts, excluding protection for tort actions based upon strict liability.

D. Framers' Intent

The theory behind strict liability is that one who engages in conduct "so far socially questionable" that it does not justify a no-fault immunity can be held strictly liable for any damages he or she causes. W. PROSSER & W. KEETON, THE LAW OF TORTS § 75, at 538 (5th ed. 1984). Strict liability is based upon "the creation of an undue risk of harm to other members of the community." *Id.*

Under turn-of-the-century common law, strict liability was recognized for torts involving damages caused by keeping wild animals, *id.* § 76, at 541, collecting and releasing water on land owned by others, storing explosives or inflammable liquids, blasting, accumulating sewage, creating nuisances, and other abnormally dangerous activities. *Id.* § 78, at 546-47; *Inspiration Consolidated Copper*, 19 Ariz. at 165, 166 P. at 283, quoting *New York Central Railroad Co.* v. *White*, 243 U.S. 188, 204, 37 S.Ct. 247, 253 (1917). *See generally* Smith, *Tort and Absolute Liability — Suggested Changes in Classification*, 30 HARV.L.REV. 319 (1917).

Given the historical milieu in which Arizona's constitution was adopted, *See generally* J. R. MURDOCK, CONSTITUTIONAL DEVELOPMENT OF ARIZONA 25-55

(1933), it is difficult to believe that the framers would have intended to deprive the legislature of the power to abrogate the right to recover for negligent torts while allowing it the power to abrogate actions dealing with many of the things held most dear by the state's residents. For instance, why would the framers have intended to prohibit the legislature from abrogating actions for negligent torts but allow it to abrogate the cause of action brought by a landowner whose property was destroyed by blasting in defendant's mining shaft? Smith, *supra*, 30 HARV.L.REV. at 330-31. Why would the framers have intended that the legislature have the power to abolish recovery by farmers and ranchers whose land had been damaged by a neighbor's diversion of surface water? *Cf.* The Revised Statutes of Arizona Territory § 3252-53 (1901) (mine owners failing to provide for drainage liable for cost of pumping or draining overflow into another's mine); The Revised Statutes of Arizona Territory § 2353 (1887) (same). To adopt the construction of art. 18, § 6 urged by defendants would fly in the face of much of what history tells us the framers considered most dear and important. *See generally* J. R. MURDOCK, *supra*.

It is equally incomprehensible to imagine why the framers would have intended to limit the protection of art. 18, § 6 to bodily injury damages, thus excluding cases of injury to real property, personal property, reputation, privacy, and other noncorporeal rights. The framers considered these rights quite important. *See, e.g.*, Ariz. Const. art. 2, § 6 (guaranteeing to each person the right to "freely speak, write, and publish . . ., being responsible for the abuse of that right."); Ariz. Const. art. 2, § 8 (guaranteeing the right to privacy).

We can deduce no reason, and none has been suggested to us, for attributing to the framers any reasoned intent to narrow the scope of this broadly-worded provision. We turn,

then, in our search for framers' intent, to the construction given "open court" provisions prior to our adoption of a "stronger" version. We seek to determine, in other words, what the framers thought they were adopting.

E. Open Court Provisions of Other States

Even before 1912, other states had applied the protection of their open court provisions to the right to recover damages for injury to reputation. *See Post Publishing Co.* v. *Butler*, 137 F. 723 (6th Cir. 1905) (applying Ohio Constitution);[8] *Moore* v. *Stevenson*, 27 Conn. 13, 27 (1858);[9] *Hanson* v. *Krehbiel*, 68 Kan. 670, 75 P. 1041 (1904);[10] *Allen* v. *Pioneer Press*, 40 Minn. 117, 41 N.W. 936 (Minn. 1889);[11] *Osborn* v. *Leach*, 135 N.C. 628, 47 S.E. 811 (1904);[12] *see also Meyerle* v. *Pioneer Publishing Co.*, 45 N.D. 568, 178 N.W. 792 (1920) (per curiam);[13] *Byers* v. *Meridian Printing Co.*, 84 Ohio St. 408, 95 N.E. 917 (1911) (per curiam).[14]

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[8]All courts shall be open, and every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law. Ohio Const., art. I, § 16.

[9]All courts are to be open to grant redress for every injury to the person, property, or reputation, without denial or delay. Conn. Const., art. I, § 10, *cited in Moore, supra.*

[10]All persons, for injuries suffered in person, reputation, or property, shall have remedy by due course of law . . . . Kansas Const., Bill of Rights § 18.

[11][E]very person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive on his person, property, or character. Minn. Const., art. I, § 8.

[12]All courts shall be open, and every person, for an injury in his lands, goods, person, or reputation, shall have remedy by due course of law. N.C. Const., art. I § 35.

[13]All courts shall be open, and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due process of law . . . . N.D. Const., art. I, § 22.

[14]*See* n. 7, *supra.*

That same principle has been followed in modern cases.[15] *See Madison* v. *Yunker*, 180 Mont. 54, 589 P.2d 126 (1978);[16] *Davidson* v. *Rogers*, 281 Or. 219, 574 P.2d 624 (1978).[17] To our knowledge, no court in an open court provision state has ever held the clause inapplicable to the right to seek relief for injury to reputation. In fact, one state with no constitutionally compelled open court guarantee was willing to strike down its retraction statute:

> There is no room for holding in a constitutional system that private reputation is any more subject to be removed by statute from full legal protection than life, liberty, or property. It is one of those rights necessary to human society that underlie the whole social scheme of civilization.

Park v. *Detroit Free Press Co.*, 72 Mich. 560, 566, 40 N.W. 731, 733 (1888). *But see Werner* v. *Southern California*

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[15]Some courts have used the open court provision to invalidate retraction statutes substantively similar to Arizona's. *See Hanson*, 68 Kan. 670, 75 P. 1041; *Madison* v. *Yunker*, 180 Mont. 54, 589 P.2d 126 (1978); *Byers*, 84 Ohio St. 408, 95 N.E. 917. Other states have upheld the constitutionality of their retraction statutes against an open court attack by interpreting the statute either to allow plaintiffs to recover general damages, or to allow them an option of either demanding a retraction or seeking general damages. *See Post*, 137 F. 723; *Allen*, 40 Minn. 117, 41 N.W. 936, *explained in Thorson* v. *Albert Lea Publishing Co.*, 190 Minn. 200, 215 N.W. 177 (1933); *Osborn*, 135 N.C. 628, 47 S.E. 811; *Meyerle*, 45 N.D. 568, 178 N.W. 792. Oregon held its retraction statute constitutional on the ground that it does not deny a remedy, but provides an alternative remedy — retraction. *Davidson*, 281 Or. 219, 574 P.2d 624; *Holden* v. *Pioneer Broadcasting Co.*, 228 Or. 405, 365 P.2d 845 (1961), *cert denied*, 370 U.S. 157, 82 S.Ct. 1253 (1962).

[16]Courts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character. Mont. Const., art. II, § 16.

[17]No court shall be secret, but justice shall be administered openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation. Or. Const., art. I, § 10.

Associated Newspapers, 35 Cal.2d 121, 216 P.2d 825 (1950) (upholding retraction statute against equal protection and due process challenges in state without open court provision).

The scope of "open court" or "access to justice" constitutional guarantees was well characterized in an early Oregon case that dealt with a legislative enactment prohibiting tort actions against counties. Holding that the statute violated Oregon's open court provision, *see* n.16, *ante*, the Oregon Supreme Court quoted from *Eastman* v. *Clackamas County*, (C.C.) 32 Fed. 24, 32 (1887):

> Whatever injury the law, as it . . . stood [at the time of the Constitution], took cognizance of and furnished a remedy for, every man shall continue to have a remedy for by due course of law. When this Constitution was formed and adopted, it was and had been the law of the land, from comparatively an early day, that a person should have an action for damages against a county for an injury caused by its act or omission. If this then known and accustomed remedy can be taken away in the face of this constitutional provision, what other may not? Can the legislature, in some spasm of novel opinion, take away every man's remedy for slander, assault and battery, or the recovery of a debt? and, if it cannot do so in such cases, why can it in this?

Theiler v. *Tillamook County*, 75 Or. 214, 217, 146 P. 828, 829 (1915). The Kansas Supreme Court long ago invalidated a retraction statute similar to ours, holding that it violated the Kansas access to justice provisions guarantee-

ing a "remedy by due course of law." *Hanson*, 68 Kan. at 672-78, 75 P. at 1042-44.[18]

Assuming that the framers of our constitution were familiar with contemporaneous principles of jurisprudence and constitutional law,[19] we must conclude that their use of all-inclusive language in art. 18, § 6 was intended to provide the same type of broad protection that resulted from construction given such clauses in our sister states.

After examining the text, the history, our prior case law, and the law of other states construing similar open court provisions, we conclude that the framers did not intend the protection of art. 18, § 6 to extend only to actions for negligent torts involving bodily injury claims. We hold, therefore, that art. 18, § 6 protects the right to recover damages for injury to reputation.

F. Is Emotional Injury a Damage within the Scope of Art. 18, § 6?

As we have shown, art. 18 § 6 was intended to take the right to seek justice out of executive and legislative control,

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[18]Florida holds that its open court provision prohibits legislative abrogation of causes of action adopted from English common law by statute in 1829 (*see* A.R.S. § 1-201) or provided by law prior to Florida's Declaration of Rights in 1838. *Kluger* v. *White*, 281 So.2d 1 (Fla. 1973); *Clarke* v. *Storchak*, 384 Ill. 564, 576, 52 N.E.2d 229, 236 (1943), *appeal dismissed*, 322 U.S. 713, 64 S.Ct. 1270 (1944) (*lack of federal question*); *Ludwig* v. *Johnson*, 243 Ky. 533, 543, 49 S.W.2d 347, 351 (1932). A similar holding was reached in *Gentile* v. *Altermatt*, 169 Conn. 267, 286, 363 A.2d 1, 12 (1975), *appeal dismissed*, 423 U.S. 1041, 96 S.Ct. 763 (1976) (*lack of federal question*). These cases reflect the vast majority of cases holding that the open court or access to justice provisions of state constitutions protect the right to sue for damages to reputation and that statutes that abrogate that right are void. *See ante* at 16-18. Again, we note that art. 18, § 6 of our constitution is but a "stronger" form of open court guarantee.

[19]Thirteen of the fifty-two delegates at the 1910 constitutional convention were lawyers. Bakken, *The Arizona Constitutional Convention of 1910*, 1978 ARIZ.L.J. 1, 25 n.182.

preserving the ability to invoke judicial remedies for those wrongs traditionally recognized at common law. Defendants argue that even if art. 18, § 6 protects a plaintiff's right to sue for damage to reputation, the provision does not protect recovery for emotional distress because that type of damage was not recognized in a defamation action until 1922. *Conard*, 23 Ariz. at 605, 206 P. at 169.[20] Defendants would have us freeze the principles and incidents of common law actions as of 1912. We reject this argument.

Although art. 18, § 6 preserves common law rights, our common law is not frozen as of 1912. *Summerfield* v. *Superior Court*, 144 Ariz. 467, 698 P.2d 712 (1985).[21] The constitutional protection extends to wrongs recognized at common law, but it is not limited to those elements and concepts of particular actions which were defined in our pre-statehood case law. Article 18, § 6 protects the *right of people to seek "remedy by due course of law"* for injury to their "lands, goods, person, or reputation." Proposed Constitution of 1891, art. 2, § 15 (emphasis added). The law must allow for evolution of common-law actions to reflect today's needs and knowledge. Any other rule would allow those "long dead" to dictate solutions to problems of which

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[20]Recovery for emotional distress in a defamation action, although not expressly referred to in Arizona until 1922, was not a novel idea. Such damages were recoverable at common law. *Conard*, 23 Ariz. at 605-06, 206 P. at 169 (citing ODGERS, LAW OF LIBEL AND SLANDER 302 (1877); *Boldt v. Budwig*, 19 Neb. 739, 28 N.W. 280 (1886)).

[21]By analogy, when Arizona became a state it adopted the common law of England as the "rule of decision" in our courts. A.R.S. § 1-201. This statute, however,

> [d]oes not mean that the common law adopted at the time of statehood never changes. Just as the common law is court-made law based upon the circumstances and conditions of the time, so can the common law be changed by the court when conditions and circumstances change.

Fernandez v. Romo, 132 Ariz. 447, 449, 646 P.2d 878, 880 (1982).

they could not have been aware. *Lewis* v. *Wolf*, 122 Ariz. 567, 568, 596 P.2d 705, 706 (App. 1979) (citing Douglas, *Stare Decisis*, 49 COLUM.L.REV. 735, 736 (1949)).

Nor is responsibility for and power over such evolution taken from the legislature. We are not diminishing the legislature's power to regulate the incidents of common-law actions. We have noted previously that "a statute is not an alien intruder in the house of the common law." *Summerfield*, 144 Ariz. at 473, 698 P.2d at 718 (citing Stone, *The Common Law in the United States*, 50 HARV.L.REV. 4, 15 (1936)). We have held also that the common law may "participate in the growth and evolution of a statutorily created action." *Summerfield*, 144 Ariz. at 473, 698 P.2d at 718. Article 18, § 6 does eliminate the legislature's power to control the existence of tort law. The guarantee of access to judicial remedy prevents the legislature from closing the courthouse door to those claiming to have suffered a wrong recognized by the common law. History teaches us that despite the shortcomings of the judicial system, only in a court of justice may the rights of all be recognized and treated equally. Our founders adopted this concept in creating separate but equal branches of government and imposing each as a check and balance on the others.

Thus, while the legislature may regulate what is done in the courthouse, it may not turn the courts into a useless structure by barring access. Regulation is a shared power, but abrogation by abolishing access to judicial remedy is beyond legislative power. This brings us to defendants' final argument: that the retraction statutes do not violate art. 18, § 6 because they only regulate the right to recover for defamation.

II. Is the Retraction Statute an Abrogation or a Regulation?

We have consistently held that the constitution prohibits legislative abrogation, but not legislative regulation, of a right of action. *Ruth* v. *Industrial Commission*, 107 Ariz. 572, 575, 490 P.2d 828, 831 (1971); *Moseley*, 38 Ariz. at 420-21, 300 P. at 959. We differentiate between abrogation and regulation by determining whether a purported legislative regulation leaves those claiming injury a reasonable possibility of obtaining legal redress. *Ruth*, *supra*; *Kilpatrick*, 105 Ariz. at 419-21, 466 P.2d at 24-26. We recently stated that legislative action is regulatory

> [s]o long as it leaves a claimant reasonable alternatives or choices which will enable him or her to bring the action. [The legislature] may not, under the guise of "regulation," so affect the fundamental right to sue for damages as to effectively deprive the claimant of the ability to bring the action.

Barrio, 143 Ariz. at 106, 692, P.2d at 285 (citing *Kenyon*, 142 Ariz. at 88, 688 P.2d at 980 (Hays, J., concurring)). Article 18, § 6 thus guarantees that those seeking a remedy are able "to enforce [their claims] in court . . . without the necessity of overcoming practically insurmountable defenses" constructed by legislative act. *Barrio*, 143 Ariz. at 106, 692 P.2d at 285 (*quoting Industrial Commission* v. *Crisman*, 22 Ariz. 579, 595, 199 P. 390, 395 (1921) (McAlister, J., concurring)).

Arizona's retraction statutes prevent many defamed plaintiffs from recovering damages for actual injury to reputation and for emotional suffering. Once a media defendant retracts, the plaintiff can recover only special damage to his or her trade, profession, business, or occupation. A.R.S. § 12-653.02. As the court of appeals pointed out, the recovery scheme creates insurmountable hurdles for large and foreseeable classes of victims. Slip op. at 19. Among those effectively deprived of any remedy are the elderly, the retired, homemakers, children, and all others who may have no trade, business, profession, or occupation. *Id.*

Other examples are those

> [with income] from fixed investment or salary or official emolument, or business not depending upon his repute . . . The cases must be very rare in which a libel will destroy business profits in such a way that the loss can be directly traced to the mischief . . . The statute does not reach cases where a libel has operated to cut off chances of office or employment in the future, or broken up or prevented relationships not capable of an exact money standard, or produced that intangible but fatal influence which suspicion, helped by ill will, spreads beyond recall or reach by apology or retraction . . . .

Hanson, 68 Kan. at 676-77, 75 P. at 1043 (*quoting Park*, 72 Mich. at 565, 40 N.W. at 733).

Thus, the retraction statutes go beyond regulating the mode, method, and procedure to be followed in pursuing the cause of action. In addition, the retraction statutes do not merely regulate the type and amount of damage that can be

recovered.[22] Instead, they completely deprive many who have sustained real injury of judicial remedy. For many who have been wronged, the effect of the statutes is to substitute retraction — a form of correction, withdrawal, and sometimes of apology — for a judicial remedy. A retraction is insufficient. Article 18, § 6 of the constitution "fixes the right to a remedy and where it may be sought." *Madison*, 180 Mont. at 63, 589 P.2d at 131. The legislature is without power to eliminate a judicial remedy. Of course, nothing prevents the legislature from requiring that retraction be considered in mitigation of damages, a principle already recognized at common law. 50 Am. Jur.2d *Libel and Slander* § 375, at 899-900.

We hold, therefore, that A.R.S. § 12-653.02 offends art. 18, § 6 of the Arizona Constitution and is void insofar as it eliminates general damages for both loss of reputation and emotional harm, preventing those damaged by defamation from recovering general damages for *actual* injury.

Of course, the first amendment of the United States Constitution limits this holding. *See Gertz*, 418 U.S. 323, 94 S.Ct. 2997; *Dombey*, ___ Ariz. ___, 724 P. 2d 562. State remedies for defamatory falsehood must "reach no farther than is necessary to protect the legitimate interest involved." *Gertz*, 418 U.S. at 350, 94 S.Ct. at 3012.

Thus, a media defendant may not be held liable without a showing of the requisite degree of fault. *Dombey, supra*. If

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[22] Regulating damage recovery is not necessarily and completely forbidden by art. 18, § 6. *See Eastin* v. *Broomfield*, 116 Ariz. 576, 584-85, 570 P.2d 744, 752-53 (1977) (collateral source rule). It could be argued, however, that statutes abolishing traditionally recognized categories of damage, such as compensation for general damage to reputation and for emotional suffering, also are contrary to art. 2, § 31 and the last clause of art. 18, §6, both of which provide that the amount recovered shall not be subject to any statutory limitation. Because this theory was not argued, we do not reach the issue in this opinion.

the defamation involves "a matter of public concern," a jury may not award presumed or punitive damages absent a showing of "actual malice." *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, ___ U.S. ___, 105 S.Ct. 2939 (1985). Compensation may be awarded to public plaintiffs or private plaintiffs defamed by a statement involving a matter of public concern only

> for actual injury. We need not define "actual injury," as trial courts have wide experience in framing appropriate jury instructions in tort actions. Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury.

Gertz, 418 U.S. at 350-51, 94 S.Ct. at 3012; *see also Dun & Bradstreet, supra.*

CONCLUSION

The opinion of the court of appeals is approved as supplemented by this opinion. The judgment of the trial

court is reversed and the case is remanded for proceedings consistent with this opinion.

STANLEY G. FELDMAN,
Justice

CONCURRING:

WILLIAM A. HOLOHAN,
Chief Justice

FRANK X. GORDON, JR.,
Vice Chief Justice

JACK D. H. HAYS,
Justice

JAMES DUKE CAMERON,
Justice

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No. 86-1428

IN THE
Supreme Court of the United States
OCTOBER TERM 1986

PHOENIX, NEWSPAPERS, INC. AND EDYTHE JENSEN
Petitioners,

v.

STEVE W. BOSWELL AND JIM MOFFORD
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

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RESTATEMENT OF THE QUESTION

I. WHETHER THE APPELLATE OPINION AT ISSUE HERE IN ANY WAY CREATES A "PRESUMPTION OF NEGLIGENCE" IN THIS PRIVATE PERSON DEFAMATION CASE.

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ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF ARIZONA

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

JURISDICTIONAL STATEMENT

This Court lacks the jurisdiction to hear the petition since it was untimely filed. Although the Petition purports to seek a Writ of Certiorari To The Supreme Court of Arizona, in fact it complains of an opinion of the Arizona Court of Appeals. Under Arizona law, the Court of Appeals' Opinion was final on the issues raised in the within Petition, on August 28, 1985, when the Arizona Supreme Court granted review on other issues, but not on the issue complained of now (see, Appendix A, August 28, 1985 Order of the Supreme Court). See Rule 23(f) Ariz. R. C. App. Proc.

Under 28 U. S. C. §2101(c) the Petition for Writ Of Certiorari should have been filed within ninety days of August 28, 1985. Since it was not, it is untimely and this

> "She said she was upset about it, and said, well, that was her mistake, she wished it hadn't occurred, and she was going to get it taken care of right away and get a retraction printed." (RT IV 481).

The reporter never disputed Mr. Munger's testimony at any point during the trial. For example, when she was asked:

> Q: You heard Stan [Munger] testify. Do you have any reason to doubt what Stan said when he was here under oath?

Her answer was:

> A: No , I don't (RT VI 1010).

Although she admitted the article was published as she wrote it (RT I 15), the reporter never really explained how she made the error:

> "I don't remember of the specifics of what Mr. Munger told me. I can just testify that this story appeared like that and it was wrong." (RT I 16-17)

The reporter did, however, admit that this was her mistake, and that it was serious:

> Q: "Edythe, this was a serious mistake that you made, wasn't it?
>
> A: Yes, it was.

Q: In fact, wasn't it just about the most serious mistake you have ever made as a reporter?

A: Yes, I would admit that." (RT I 22)

Not only did the reporter admit the error, her supervisors admitted her negligence as well. Victor Thornton, the City Editor of the newspaper at issue and her then supervisor, testified "it must have been an error of judgment." (RT II 76).

The managing editor of the newspaper also admitted that his reporter had been negligent. He first did so in a letter which was mailed to both of the Plaintiffs and their employer:

> "The information was taken from court records and your names were inadvertently reversed with those of Pete Kyle and Pat Lorman. We regret the error and apologize for any inconvenience it has caused."
> (RT II 110).

He later explained that the term "court record" in his letter meant "an officer of the court" —Mr. Munger (RT VI 980).

The Managing Editor also admitted that the reporter was not careful:

Q: "Was this careful?

A: She's a careful reporter, and tries not to make mistakes.

Q: I asked whether this was careful.

A: Well, it was an error, so it obviously wasn't careful, but she intends to be careful at all times." (RT VI 990).

In light of such evidence, it is difficult to understand how Petitioners can claim that the Arizona Courts found some presumption of negligence. Quite the opposite there was direct evidence of negligence, through admissions of the reporter, her city editor, and the managing editor.

REASONS FOR DENYING WRIT

I. *There Is No Special And Important Reason For Granting Any Review Here*

Conspicuously absent from the petition is any discussion of the considerations outlined in S. C. Rule 17.

The Arizona Court of Appeals' Opinion has no widespread significance. Its holding is related to a particular set of facts and circumstances not likely to be repeated.

II. *Neither The Opinion Below Nor The Record Create Any Presumption of Fault*

The fatal flaw in Petitioner's reasoning is their claim that they have been held "presumptively at fault." (Petition at 6). Not so.

The Arizona Court of Appeals recognizes throughout their Opinion that it was Respondent's burden to prove negligence. The Court accepted the view that "the uncontracted evidence established Appellee's negligence." (Opinion, Petitioner's Appendix A at 4a).

The Court also recognized "to prevail on a directed verdict motion here the evidence had to establish... negligence on the part of the publisher." (*Id.*)

There was no "presumption" of anything here. Rather, Petitioners were shown to have been negligent on undisputed facts. The Court of Appeals appropriately mandated that a directed verdict be entered.

CONCLUSION

For these reasons, the Petition For a Writ Of Certiorari should be denied.

Respectfully submitted this _____ day of April, 1987.

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APPENDIX A

IN THE
Supreme Court
STATE OF ARIZONA

STEVE W. BOSWELL AND JIM MOFFORD, *Plaintiffs/Appellants,*	)	No. 18159-PR
v.	)	ORDER
PHOENIX NEWSPAPER, INC., an Arizona corporation; and EDYTHE JENSEN, *Defendants/Appellees.*	)	

Pursuant to Rule 23(f) Ariz. R. C. App. Proc. the court grants review on the following issues:

1. Does Article XVIII §6 of the Arizona Constitution apply to common law defamation actions?

2. If so, by prohibiting (where there has *been* adequate retraction and no proof of malice) recovery of general damages for injury to reputation and emotional injury, does A. R. S. § 12-653.01 "abrogate" a "right of action for injuries" and thus violate Article XVIII, §6?

Counsel for Appellants may file a supplement brief on the foregoing issues on or before September 12, 1985.

Counsel for Appellees and counsel for the Amici may file reply briefs on the foregoing issues on or before September 26, 1985.

Oral argument of the case is set for October 11, 1985, at the College of Law, University of Arizona, Tucson, Arizona.

DATED this 28th day of August, 1985.

/s/ William A. Holohan
WILLIAM A. HOLOHAN, Chief Justice

c:
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James F. Henderson, Esq. & Glen Hallman, Esq., Gust, Rosenfeld, Divelbess & Henderson
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Supreme Court, U.S.
FILED
APR 16 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1428

IN THE

Supreme Court of the United States

OCTOBER TERM 1986

PHOENIX NEWSPAPERS, INC. AND EDYTHE JENSEN
Petitioners,

v.

STEVE W. BOSWELL AND JIM MOFFORD
Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

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ADDITIONAL QUESTION PRESENTED

WHETHER THE ORDER OF A STATE SUPREME COURT ACCEPTING REVIEW OF CERTAIN ISSUES IS "FINAL" AS TO MATTERS EXCLUDED FROM REVIEW SUCH AS TO REQUIRE THE IMMEDIATE FILING OF A PETITION FOR CERTIORARI.

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

ARGUMENT

I. A PETITION FOR WRIT OF CERTIORARI IS TIMELY WHEN TAKEN FROM A DECISION SUMMARILY AFFIRMING AN ISSUE ADDRESSED BY AN INTERMEDIATE APPELLATE COURT.

In their Brief in Opposition, respondents question whether the petition for certiorari is timely. Brief in opposition 1. Respondents argue that petitioners should have split their appeal at the time the Arizona Supreme Court granted discretionary review as to some, but not all, of the issues urged by petitioners in that court. Respondents' argument lacks support in both authority and logic. Application of the rule they urge would result in piecemeal appeals to this court.

Contrary to respondents' representations, the record indicates consideration by the Arizona Supreme Court of

the constitutional issues urged in this petition. It is uncontroverted that petitioners sought discretionary review in the Arizona Supreme Court of both the issues urged here and state issues. That court accepted review on August 20, 1985. Order of the Arizona Supreme Court (August 20, 1985), Appendix A, hereto. One week later, in an order scheduling supplemental briefs and oral argument, the court defined and limited the issues to matters not urged in this petition. It is that order to which respondents refer. Order of the Arizona Supreme Court (August 28, 1985), Appendix A to Brief in opposition. Neither order mentions the constitutional issues.

In its subsequent decision, the Arizona Supreme Court summarily affirmed the court of appeals' resolution of the issues urged here:

> The court of appeals held that the trial court should have directed a verdict on the liability issue because defendants had been negligent as a matter of law.
>
> . . .
>
> . . . Approving the court's resolution of the other questions, we granted review solely on the abrogation holding.

Boswell v. *Phoenix Newspapers, Inc.*, 152 Ariz. 9, 730 P.2d 186, 55 U.S.L.W. 2399 (1986), Appendix C to Petition for Certiorari at 4c-5c.

> The opinion of the court of appeals is approved as supplemented by this opinion. The judgment of the trial court is reversed and the case is remanded for proceedings consistent with this opinion.

Id. at 24c-25c. By specifically approving the lower court's opinion on the federal issues, the supreme court went well

beyond a mere denial of review, which has no precedential value. *Calvert* v. *Farmers Ins. Co. of Arizona,* 144 Ariz. 291, 297 n.5, 697 P.2d 684 (1985).

Despite the Arizona Supreme Court's continuing jurisdiction of the entire appeal and its subsequent summary ruling on the issues urged here, respondents argue that petitioners should have split their appeal at the time the supreme court limited its active consideration of the issues. The precise question appears to be of first impression.

Administrative concerns support the instant situation. A rule delaying the filing of a petition for certiorari until final review of all issues in the state supreme court comports with the long-standing policy against piecemeal appeals:

> It is the settled practice of this court, and the same in the King's Bench in England, that the writ will not lie until the whole of the matters in controversy in the suit below are disposed of. The writ itself is conditional and does not authorize the court below to send up the case, unless all of the matters between the parties to the record have been determined. The cause is not to be sent up in fragments.

Holcombe v. *McKusick,* 20 How. 552, 15 L. Ed. 1020, 1021 (1858) (refusing to review alleged error in an interlocutory appeal to the Supreme Court of the Territory of Minnesota).

The sole authority presented by respondents has nothing to do with the timeliness of a petition to this court. *Stembridge* v. *Georgia,* 343 U.S. 541 (1952), involved a situation in which the Georgia Supreme Court appeared to have declined review of the constitutional issues urged by petitioner solely on the basis of valid state procedural grounds, thus depriving this court of jurisdiction. *Id.* at 546.

Likewise, respondents produce no valid authority supporting their claim that the constitutional issues urged here became "final" at the time the Arizona Supreme Court issued its limiting order. The rule cited by respondents, Ariz. R. Civ. App. P. 23(f), does not address the issue of finality; the rule merely provides a mechanism by which the Arizona Supreme Court can focus its review:

> If the supreme court grants review, its order shall specify the issue or issues which are to be reviewed. The supreme court may order that the parties file additional briefs or that oral argument be heard, or both.

Ariz. R. Civ. App. P. 23(f), Appendix B, hereto.

Contrary to respondents' assertions, there is no "finality" under Arizona law until the supreme court rules upon *all* issues raised on review. No mandate may issue from the court of appeals until all petitions and cross-petitions for review have been denied and the clerk of the court of appeals has been so notified. Ariz. R. Civ. App. P. 24(a)(3), Appendix C, hereto; Ariz. R. Civ. App. P. 23(h), Appendix B, hereto. If the Arizona Supreme Court decides to grant a petition for review, any subsequent mandate will be issued by that court. Ariz. R. Civ. App. P. 24(a)(4), Appendix C, hereto. No separate provision is made for issues the court excludes from review. *See id.*

Until such time as it issues its decisions, the Arizona Supreme Court retains jurisdiction of the entire matter. It may even raise and decide issues sua sponte. *Dombey* v. *Phoenix Newspaper, Inc.*, 150 Ariz. 476, 482, 724 P.2d 562, 568 (1986). It has the entire record before it. Ariz. R. Civ. App. P. 23(g), Appendix B, hereto. Even for purposes of deciding whether to grant review as to some or all of the

issues, the court has considered all briefs filed in the intermediate court as well as the petition and all relevant portions of the record. *See* Ariz. R. Civ. App. P. 23(c), 23(d), Appendix B, hereto. It is in a position to affirm summarily, if it so desires.

In this case, the Arizona Supreme Court went beyond the mere denial of review. It considered all the issues raised in the petition for review and, in its subsequent decision, summarily approved and explicitly adopted the court of appeals' resolution of the federal issues. The petition for certiorari is timely and properly directed to the Arizona Supreme Court.

II. RESPONDENTS' COUNTERSTATEMENT OF THE CASE ONLY EMPHASIZES THE FACTUAL DISPUTE THAT THE APPELLATE COURTS BELOW RESOLVED BY APPLYING AN UNCONSTITUTIONAL PRESUMPTION OF FAULT.

As evidenced by the out-of-context quotations presented by respondents, the reporter and her editors at trial candidly accepted a journalist's responsibility to strive for perfection. Brief in opposition 3-5. Jensen's source, deputy county attorney Stan Munger, accepted no such responsibility. Based on his preparation of the underlying criminal case, Munger refused to believe he could have confused the names of two suspects with the names of two security guards. *Id.* 2. Munger's testimony of belief — based on nothing more than his faith in himself — did not sway the jury.

Contrary to their apparent intention, respondents' counterstatement of facts only emphasizes the issue at trial concerning Munger's credibility. *See* Petition for Certiorari

at 3-5. The appellate courts below resolved the issue contrary to the jury verdict by applying a common law rule that ignores credibility and equates a mistake with a presumptive absence of due care.

ERRATA

A citation at page 11 of the Petition for Certiorari erroneously refers to a footnote. The proper citation is: P. Devlin, *Trial by Jury* 159-60 (1956).

A citation on page 2 of respondents' Brief in Opposition refers to the wrong volume. The correct citation is: *Stembridge* v. *Georgia,* 343 U.S. 541 (1952).

Respectfully submitted,

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APPENDIX A

IN THE

Court of Appeals

STATE OF ARIZONA
DIVISION ONE

August 23, 1985

RE: STEVE BOSWELL et al vs.
PHOENIX NEWSPAPERS, INC. et al
Supreme Court No. 18159-PR
Court of Appeals No. 1 CA-CIV 6123
Maricopa County No. C-366121

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on August 20, 1985, in regard to the above-referenced cause:

"ORDERED: Petition for Review Granted.

FURTHER ORDERED: Motions of Arizona Broadcasters Association, et al and Citizen Publishing Company for Leave to Participate as Amicus Curiae — GRANTED."

Petitioners' [Appellees Phoenix Newspapers/Jensen] filing fee in the amount of $25.00 and Respondents' [Appellants Boswell/Mofford] filing fee in the amount of $15.00 should be remitted within fifteen days.

The Clerk of the Court of Appeals, Division One, Phoenix, shall forward the record to the Clerk of the Supreme Court.

DIANA K. BENTLEY, Acting Clerk

TO: Kraig Marton, Esq., Marton & Hall, P.A.
James F. Henderson, Esq., and Glen Hallman, Esq., Gust, Rosenfeld, Divelbess & Henderson

Hon. John H. Seidel, Judge, Maricopa County
Superior Court
Vivian Kringle, Clerk, Maricopa County
Superior Court
Glen D. Clark, Clerk, Court of Appeals,
Division One

APPENDIX B

Rule 23. Petition for reveiw

23(c) Form and Contents.

The form of the petition or cross-petition for review shall comply with Rule 6(c) and the parties shall be designated as in the Court of Appeals. The petition shall not exceed twenty pages, exclusive of the appendix and shall contain concise statements of the following:

1. A synopsis of the decision of the Court of Appeals. A copy of the decision shall be included in the appendix.

2. The issues presented for review.

3. The facts material to a consideration of the issues presented.

4. The reasons why the petition should be granted, which may include, among others, the fact that no Arizona decision controls the point of law in question, that a decision of the Supreme Court should be overruled or qualified, that conflicting decisions have been rendered by the Court of Appeals, or that important issues of law have been incorrectly decided.

All references to the record on appeal shall be supported by an appendix, with appropriate copies of the portions of the record which support the petition. The petition shall not incorporate any document by reference, except the appendices.

23(d) Transmittal of Partial Record Upon Filing of a Petition for Review.

Upon the expiration of the time for filing a cross-petition for review, the clerk of the Court of Appeals shall transmit to the clerk of the Supreme Court a partial record of the case consisting of the original and all copies of

the petition or cross-petition for review, the original and all copies of the briefs filed in the Court of Appeals, and one copy of the decision of the Court of Appeals.

* * *

23(f) Order Granting Review.

If the Supreme Court grants review, its order shall specify the issue or issues which are to be reviewed. The Supreme Court may order that the parties file additional briefs or that oral argument be heard, or both. If the order granting review does not provide for supplementation of briefs or for oral argument, either party may, within 15 days after the clerk mails notice of the Court's order, request the Court to do so by a motion specifying the reasons for supplementation or for oral argument, or both.

23(g) Transmittal of Remaining Record.

Upon notification by the clerk of the Supreme Court that a petition or cross-petition for review has been granted, the clerk of the Court of Appeals shall transmit the remaining record to the clerk of the Supreme Court.

23(h) Denial of Petitions.

When all petitions and cross-petitions for review have been denied, the clerk of the Supreme Court shall so notify the clerk of the Court of Appeals and the parties, and shall return the original copies of the briefs and the petition or cross-petition for review to the clerk of the Court of Appeals.

APPENDIX C

Rule 24. Issuance of mandates by appellate courts and mandates from United States Supreme Court

24(a) Mandates by Appellate Courts

(1) If there has been no motion for reconsideration and no petition for review filed, the clerk of the Court of Appeals shall issue the mandate at the expiration of the time for the filing of such motion or petition.

(2) If a motion for reconsideration has been filed, the mandate shall not issue until the motion has been disposed of and until the expiration of the time provided by Rule 23 for the filing of a petition for review.

(3) If a petition for review is filed, the clerk of the Court of Appeals shall not issue a mandate until the receipt by the clerk of the Court of Appeals of an order of the Supreme Court denying the petition for review.

(4) If a petition for review is granted by the Supreme Court, the mandate shall be issued by the clerk of the Supreme Court at the appropriate time.

(5) The papers making up the record on appeal transmitted by the clerk of the superior court to the appellate court pursuant to Rule 11(a)(1) shall be returned with the mandate to the clerk of the appropriate court or to the appropriate agency.